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ABSTRACT

Recently Title IX lawsuits have highlighted the vulnerability of colleges and universities to claims of gender discrimination in intercollegiate athletics. Female athletes have sued schools for eliminating varsity sports and for failing to create varsity teams. In addition, discrimination claims related to other gender-based issues have been filed. Title IX lawsuits can have serious consequences for institutions, including monetary damages, attorneys' fees, court-mandated funding of programs, court control of athletics programs, and additional litigation. Compliance with the law may be established by satisfying one of three tests: "Safe Harbor," wherein the institution can show that participation opportunities for male and female students are substantially proportionate to student enrollments; a history and continuing practice of programs responsive to members of the "underrepresented" sex; or that the interests and abilities of the "underrepresented" sex are "fully and effectively accommodated" by existing programs. To reduce litigation risk, the report suggests several steps, including: (1) making a careful Title IX assessment before eliminating any women's intercollegiate teams; (2) giving adequate notice of any changes and taking steps to mitigate the impact of the change; (3) making sure that institutional personnel are well acquainted with Title IX standards; and (4) reviewing existing procedures for evaluating and acting on new program requests. (CH)

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Association of Governing Boards
of Universities and Colleges

Title IX in Intercollegiate Athletics: Litigation Risks Facing Colleges and Universities

By Bill Kramer

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TITLE IX IN INTERCOLLEGIATE ATHLETICS
Litigation Risks Facing Colleges and Universities

UPSURGE IN TITLE IX LITIGATION

At a time when intense financial pressures have forced many higher education institutions to make budget cuts throughout their programs, a spate of Title IX lawsuits has highlighted the potential vulnerability of colleges and universities to claims of gender discrimination in intercollegiate athletics. Female athletes have sued their schools for eliminating varsity sports and for failing to create varsity teams for interested athletes. In addition to discrimination claims related to participation opportunities, suits over disparities in coaches' salaries, recruitment and publicity budgets, travel allowances and other resources, and retaliatory discharge claims have been filed. While not all of the recent suits have sought damages, the 1992 decision of the Supreme Court that monetary damages may be awarded in actions to enforce Title IX[1] is one reason that the number of such suits can be expected to increase.

Fundamental legal issues raised by the recent cases remain unresolved, including the central question of whether colleges and universities are required to establish or maintain teams for one sex until participation by that sex in intercollegiate athletics is proportionate to enrollment, without regard to differences in the athletics interests and abilities of their male and female students. As these issues are being contested, colleges and universities need to follow closely the development of the law in this area and to act to minimize their litigation risk.

A. Elimination of Women's Teams

Several suits have arisen from colleges' and universities' efforts to reduce their athletics budgets by eliminating varsity teams.

- Colorado State University eliminated its women's varsity softball team with 18 participants and its men's varsity baseball team with 55 participants. After this reduction, women comprised 48% of students and 38% of athletes, a participation-to-enrollment ratio that compares favorably with those of most Division I-A institutions. The district court found that women's participation in intercollegiate sports was not substantially proportionate to enrollment and that there was no continuing history of expansion of the women's program. The court ordered the university to reinstate the women's team, hire a coach and maintain a competitive schedule[2]. The plaintiff athletes also received monetary damages through a settlement. The federal appeals court upheld the trial court's order[3].

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1 Franklin v. Gwinnett County Public Schools, ___ U.S. ___, 112 S.Ct. 1028 (1992).

2 Roberts v. Colorado State University, 814 F. Supp. 1507 (D. Colo. 1993).

3 Roberts v. Colorado State Board of Agriculture, No. 93-1052, No. 93-1086 (10th Cir. July 7, 1993) (available on LEXIS, Genfed library, Current file, 1993 U.S. App. LEXIS 19657).

- Brown University, which had 16 men's and 15 women's varsity teams, reduced two women's and two men's teams from varsity to intercollegiate club varsity status. Before and after the cuts, women accounted for 48% of Brown students and 37% of varsity athletes. After the cuts, Brown continued to offer a very broad-based program, including 13 varsity sports for women. Acting on a motion for preliminary injunction, a district court ordered reinstatement of the two women's teams to varsity status pending a trial[4] on the merits. The appellate court affirmed the lower court's order[5].

- Indiana University of Pennsylvania eliminated four varsity teams, including two women's teams. After the cuts, women comprised 55% of the student body and 36.5% of varsity athletes, which constituted a slight reduction in the participation rate. The district court issued a preliminary injunction requiring reinstatement of the two women's teams[6], one of which is gymnastics. The university did not appeal the preliminary injunction and is preparing for a trial on the merits regarding a permanent injunction. The university asked the district court to allow it to substitute women's soccer (40-50 participants) for women's gymnastics (10-12 participants). The district court's denial of that request is on appeal[7].

B. Failure to Create Teams

In addition to the elimination of teams, alleged refusal or failure to create teams has generated suits. There have been no court decisions in these cases, but at least two have been settled.

- At The University of Texas at Austin, an institution with prominent Division I-A men's and women's programs, including a major football program, a group of intramural and club team athletes filed suit to require the creation of varsity women's teams in four sports. The plaintiffs alleged that female participation in the university's intercollegiate sports program (23%) was disproportionate to female undergraduate enrollment at the university (47%), that there was no history of program expansion, and that in these circumstances, failure to sponsor varsity teams for women in these sports violated Title IX. While the lawsuit was pending, the university announced its intention to create two new varsity women's teams to meet the interests and abilities of female students and prospective students. The university subsequently settled the case before trial, through court-ordered mediation, agreeing that 44% of its varsity athletes will be women by the 1996-97 academic year. A comprehensive review of the program will be made during the 1996-97 academic year to determine whether an additional varsity team must be added to achieve the 44% participation rate.

- In a case involving Auburn University, a lawsuit was instituted after the Department of Education, Office for Civil Rights ("OCR") had conducted an investigation and had accepted the university's proposed compliance plan. The plan accepted by OCR would have required only the creation of a varsity soccer program. The female

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[4] Cohen v. Brown University, 809 F. Supp. 928 (D.R.I. 1992).

[5] Cohen v. Brown University, 991 F.2d 888 (1st Cir. 1993).

[6] Favia v. Indiana University of Pennsylvania, 812 F. Supp. 578 (W.D. Pa. 1992).

[7] Favia v. Indiana University of Pennsylvania (3d Cir. argued May 12, 1993).

athletes, however, won a settlement in which the university agreed to pay the plaintiffs damages and legal fees, create and maintain for at least five years a women's varsity soccer team, fund soccer team operations at $360,000 for the first two years (1993-94 and 1994-95), and construct new practice and game fields and facilities for the women's soccer team. The cost of constructing the fields and facilities would not be counted against the $360,000 in operational funds.

COSTS AND CONSEQUENCES

Title IX lawsuits can have serious consequences for the institutions involved, including:

Monetary damages: Through damage awards and settlements, plaintiffs have received monetary damages as compensation for Title IX violations. In one case, a settlement agreement provided for damages in the amount of $60,000.

Attorneys' Fees: Prevailing Title IX plaintiffs may be awarded their attorneys' fees. Awards of attorneys' fees reportedly have ranged as high as $100,000 to $700,000.

Court-Mandated Funding of Programs: Court orders requiring the retention or creation of varsity teams necessarily entail financial obligations related to supporting the teams. For institutions with already strained budgets, creating and funding such teams may require significant changes in men's athletics programs.

Court Control of Athletics Programs: Courts have ordered specific actions, such as hiring coaches and providing practice and other facilities. In addition, it is possible that courts will exercise long-term control over the institution's athletics program, as they have done with public school systems and prisons.

Additional or Broader Litigation: Litigation of one Title IX claim may engender additional claims. The discovery and trial process may lead to expansion of the original suit, entirely separate actions, or an OCR investigation. An OCR investigation, even if originally based on a narrow claim, generally encompasses all aspects of an institution's intercollegiate athletics program.

WHAT THE LAW REQUIRES

Title IX prohibits sex-based discrimination in educational institutions receiving federal financial assistance. The intercollegiate athletics requirements of Title IX address three aspects of college and university sports programs -- the participation opportunities provided to male and female students; the athletic financial aid allocated to male and female participants in intercollegiate athletics; and all other benefits, opportunities, and treatment afforded participants of each sex.

Simply stated, current interpretation of Title IX requires higher education institutions to provide opportunities to participate in intercollegiate athletics that effectively accommodate the interests and abilities of students of both sexes. The overall allocation of athletic financial aid to students of each sex must be proportionate to the numbers of male and female participants in an institution's intercollegiate sports program. All other benefits, opportunities, and treatment afforded student-athletes of each sex must be equivalent.

The Title IX compliance assessment is made on a program-wide basis. Neither football nor revenue-producing sports as a class are exempt from Title IX, nor are these sports treated separately from other parts of the intercollegiate athletics program.

The requirement that both sexes' interests and abilities be accommodated includes the obligation to provide a sufficient number of participation opportunities for individuals of each sex. "Participation opportunities" are defined as the numbers of slots on teams as determined by the number of athletes on each team. A three-part OCR test[8] is used in determining whether the required number of participation opportunities are being provided. An institution must show:

- that intercollegiate participation opportunities for its students of each sex are substantially proportionate to its male and female undergraduate enrollments, or
- a history and continuing practice of program expansion responsive to developing interests and abilities of members of the "underrepresented sex," or
- that the interests and abilities of the "underrepresented sex" are "fully and effectively accommodated" by the existing program.

Compliance is established by satisfying any one of these three tests.

The first test is a "safe harbor." If a college or university can show that the numbers of male and female participants in its intercollegiate sports program are substantially proportionate to its male and female undergraduate enrollments, the institution will be found in compliance without further inquiry. How closely participation and enrollment rates must be aligned is unclear. The courts have found that differences of 10.5 and approximately 12 percentage points between participation and enrollment rates do not constitute substantial proportionality. Further development of the law will be necessary before the permissible percentage variation will be known. However, it appears that with current female participation and enrollment rates, few institutions can meet this first test.

Many institutions also will have difficulty in meeting the second test. Most colleges and universities have greatly increased the size of their women's programs, but many have not added women's teams for a number of years. Financial constraints are forcing institutions to cut, rather than to add, programs. Thus, the third test often will determine whether or not an institution will be found to be providing enough participation opportunities to comply with Title IX.

The third test, by its literal terms, requires a college or university to show that its existing intercollegiate athletics program "fully and effectively" accommodates the interests and abilities of members of the underrepresented sex — normally women. Throughout the history of the development and application of this test by OCR, it has been interpreted as requiring a showing that the interests and abilities of women are **equally** effectively accommodated, *i.e.*, are accommodated to the same degree as the interests and abilities of men. However, recent court decisions, including two federal appeals court decisions, have interpreted this third test more stringently.

These decisions were issued in cases in which women's varsity teams had been cut or reduced in status. Further, the courts found that the institutions had not demonstrated a continuing history of program expansion. In these circumstances, the courts held that so long as female participation is not proportionate to female enrollment, an institution must sponsor a varsity intercollegiate team for women when there is a sufficient number of interested and qualified female athletes to sustain such a team, and there is a reasonable expectation of competition for that team. The previous existence of a varsity team was considered compelling evidence of the existence of sufficient interest and ability to require a team to be maintained.

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[8] See Title IX of the Education Amendments of 1972; a Policy Interpretation; Title IX and Intercollegiate Athletics, 44 Fed. Reg. 71,413, 71,418 (December 11, 1979).

As stated, this interpretation would require varsity teams to be sponsored for students of one sex without regard to whether varsity teams are provided for similarly situated students of the other sex. It also would require such teams to be offered without any examination of the relative levels of interest and ability of an institution's students of each sex, until participation by sex is aligned with enrollment. It has been challenged as granting a gender-based preference contrary to the express language of Title IX,[9] longstanding OCR interpretation of the third test, and the Equal Protection Clause of the Constitution, and cases in which it has been adopted have been appealed.

However, while the validity of this interpretation is being contested, any college or university faces a serious risk of being found in violation of Title IX if it:

- does not have a breakdown of participation in its intercollegiate sports program by sex substantially proportionate to its enrollment breakdown by sex;
- cannot demonstrate a continuing practice of expanding its women's program; and
- has cut any women's team (regardless of whether it has cut equivalent or larger numbers of men's slots) or has not established a women's intercollegiate team when interested and qualified athletes and competition are available for such a team.

STEPS INSTITUTIONS SHOULD CONSIDER TAKING

To reduce their litigation risk under the recent court decisions, colleges and universities should consider taking the following steps:

1. Make a careful Title IX assessment before eliminating any women's intercollegiate team, making any other reduction in your women's program, or adding any men's team.
2. If you make any reduction in your men's or women's program, give adequate notice of the change and consider taking steps to mitigate the impact of the change on those affected.
3. Make sure that institutional personnel responsible for deciding what sports programs are to be offered are well acquainted with the current Title IX standards governing such decisions, including the interpretation of the three-part test adopted in recent court decisions.
4. Review existing procedures for evaluating and acting on requests that new intercollegiate teams be established, and adopt whatever changes are necessary to ensure that an appropriate process is in place, and that the process is perceived to be reasonable and fair.
5. Review the criteria being applied in deciding whether to add or drop intercollegiate teams, and see that they are appropriate and consistent with Title IX.
6. In accordance with those procedures and criteria, carefully evaluate, and take appropriate action with respect to, any request by a women's club team or other group of female athletes for the creation of a varsity team.

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[9] Title IX prohibits discrimination on the basis of sex; it does not require affirmative action in the absence of a finding of discrimination. The statute contains a provision that expressly prohibits its nondiscrimination mandate from being interpreted to require any educational institution to grant preferential or disparate treatment to the members of one sex on account of any imbalance in participation levels by sex.

7. With the assistance of counsel, decide whether in the circumstances of your institution, it is advisable to conduct a self-assessment of compliance with the participation opportunities requirements of Title IX, or a broader Title IX self-assessment. If you undertake such an assessment, be prepared to make changes in your program if you find that changes are necessary.

8. If you conduct a self-assessment, prepare as part of the assessment (1) a complete history of the development of your men's and women's intercollegiate sports programs, including a chronology of the addition and dropping of teams and of the numbers of participants of each sex and (2) a comprehensive appraisal of the athletics interests and abilities of your students of each sex, based on an examination of survey results, past requests for teams, admissions and registration data, participation levels in club and intramural sports, high school sports offered and high school participation levels in the areas from which you draw your students, and all other available information.

9. Consider making the Title IX assessment a regular part of your institutional planning process.

10. With the assistance of counsel, determine whether your existing intercollegiate athletics program satisfies the OCR three-part participation opportunities test. If you conclude that it does not, evaluate whether, in the circumstances of your institution, including your male and female students' athletics interests and abilities and the history of the development of your women's program, compliance can best be achieved by:

    - satisfying the substantial proportionality to enrollment test by adding women's teams, eliminating men's teams, regulating squad sizes, or some combination of these steps;

    - maintaining a continuing practice of program expansion by adding one or more women's teams; or

    - establishing a women's program that effectively accommodates your female students' athletics interests and abilities, in accordance with the meaning of this test as determined by on-going development of the law.

11. Recognize that budget pressures, differences in revenue production, and other financial considerations do not override an institution's Title IX obligations.

12. Review existing grievance procedures and see that procedures are in place that will ensure that perceived gender equity problems in your intercollegiate sports program are brought forward and resolved.

The recent upsurge in Title IX litigation demonstrates the immediate need for colleges and universities to focus on Title IX as a source of potential liability. Because this area of the law is still evolving, and because the circumstances of individual colleges and universities differ, it also will be important to keep abreast of further legal developments and to analyze their implications for your institution.